Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: 87-770

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RICHARD SUAREZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Brief for the Florida Criminal Defense Attorneys Association as Amicus Curiae in Support of Petitioner Richard Suarez

SHERYL J. LOWENTHAL
Counsel for Amicus
Suite 304 2550 Douglas Road
Coral Gables, FL 33134
Telephone: (305) 442-1731
and
ROBERT KALTER, Attorney at Law
Penthouse, 330 Biscayne Blvd.
Miami, FL 33132
Telephone: (305) 372-3477

35pp

QUESTIONS PRESENTED

I

WHETHER A LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE FOR PURPOSES OF PROVING THE ALLEGATIONS OF A MOTION TO WITHDRAW A GUILTY PLEA AUTOMATICALLY BECOMES A WAIVER FOR ALL FUTURE PURPOSES AND PROCEEDINGS?

II

WHETHER IT IS UNREASONABLE AND UNNECESSARY TO REQUIRE COUNSEL IN THE HEAT OF A TRIAL, TO GIVE SPECIFIC RULE AND CASE CITATIONS IN ORDER TO PRESERVE OBJECTIONS FOR APPELLATE REVIEW?

TABLE OF CONTENTS AND CITATIONS

QUESTIONS PRESENTED i

TABLE OF CONTENTS AND CITATIONS ii

INTEREST OF AMICUS 2

REASONS FOR GRANTING THE WRIT

I

A LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE FOR PURPOSES OF PROVING THE ALLEGATIONS OF A MOTION TO WITHDRAW A GUILTY PLEA DOES NOT AUTOMATICALLY BECOME A WAIVER FOR ALL FUTURE PURPOSES AND PROCEEDINGS. 8

Kercheval is Applicable, but the Instant Case is far More Egregious 15

II

IT IS BOTH UNREASONABLE AND UNNECESSARY TO REQUIRE COUNSEL IN THE HEAT OF A TRIAL, TO GIVE SPECIFIC RULE AND CASE CITATIONS IN ORDER TO PRESERVE OBJECTIONS FOR APPELLATE REVIEW.

The Eleventh Circuit Failed to Consider Simmons 20

Rules of Evidence and Procedure are Self-Executing and Need not be Invoked by Counsel in Order to be Applied 23

CONCLUSION 26

CITATIONS

Cases

Blair v. United States, 401 F.2d 381 (D.C. Cir. 1968) 21

Kercheval v. United States, 274 U.S. 220 (1927) 15, 16, 17, 19

Simmons v. United States, 390 U.S. 377 (1968) 4, 5, 20, 21, 22, 23, 26

The United States Constitution

Fourth Amendment 27

Fifth Amendment 27

Sixth Amendment 10, 13, 14, 29

Federal Rules of Criminal Procedure

Rule 11 5, 23, 25, 26

Federal Rules of Evidence

Rule 410 5, 23, 25, 26

CASE NO.: 87-770

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RICHARD SUAREZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Brief for the Florida Criminal Defense Attorneys Association as Amicus Curiae in Support of Petitioner Richard Suarez

INTEREST OF AMICUS

The Florida Criminal Defense Attorneys Association was founded to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, to promote proper administration of criminal justice and to encourage the integrity, independence and expertise of the criminal defense practitioner. The members of the Association are criminal defense lawyers who devote their professional lives to defending persons accused of crimes.

This case involves two issues of great interest and concern to the Association. First, is the matter of a limited waiver by

the defendant of his attorney-client privilege in order to pursue a motion to vacate a guilty plea, where there was acknowledgment of all counsel and the court that the only way he could prove the grounds raised in his motion was to waive his constitutionally protected attorney-client privilege and authorize the government to call (on rebuttal) his former attorney to testify to what was said between them in the course of the attorney-client relationship to induce the guilty plea.

Once the plea was vacated and the defendant went to jury trial, the government called the former attorney as a witness for the prosecution on its case in chief, and the court allowed this testimony

to be admitted over strenuous defense objection, finding that the pretrial waiver in the change of plea proceeding was also automatically a waiver for testimony at trial on the issue of guilt.

This ruling was affirmed on appeal. Amicus believes that relief clearly is warranted from this intolerable, unfair and fundamental constitutional error.

The second issue of concern to the Association is that the Eleventh Circuit denied relief on the argument raising the applicable rules of evidence and of criminal procedure and refused to consider the controlling case law from this Court, to wit, Simmons v. United States, infra, because it found that counsel failed to

specifically refer to the rules or to cite the case when she objected to the government calling former defense counsel to testify against Richard Suarez. Amicus suggests (a) that it is unreasonable to expect trial counsel, faced with an unforseeable and totally surprising development at trial, to be prepared with specific rule or case citations on a moment's notice and (b) in any event, the trial judge understood the grounds of the objection.

Simmons is the controlling precedent and Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence are applicable to this situation. The rules should be self-executing without requiring counsel to

invoke them; and Simmons, the applicable binding precedent cannot just be ignored by the appellate court in reaching its decision on the merits.

As attorneys involved in the defense of criminal cases, the primary interest of the membership of the Association is to ensure that fundamental rights are recognized and afforded all persons, including a defendant who must agree to allow his former attorney testify in order to pursue his constitutional and statutory right to set aside an involuntarily induced guilty plea as well as a defendant whose counsel makes appropriate objections stating the proper grounds, without referring to specific

rules or case citations in response to a surprise development at trial.

Counsel for the respective parties have given their consent to the filing of this Amicus brief. Their letters of consent are filed with Court together with the filing of this Brief for Amicus Curiae.

REASONS FOR GRANTING THE WRIT

I

A LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE FOR PURPOSES OF PROVING THE ALLEGATIONS OF A MOTION TO WITHDRAW A GUILTY PLEA DOES NOT AUTOMATICALLY BECOME A WAIVER FOR ALL FUTURE PURPOSES AND PROCEEDINGS.

Briefly, the facts as set forth in the Petition for Writ of Certiorari showed that Richard Suarez entered a plea of guilty in federal criminal proceedings, and that that plea was later found by the trial judge to have been wrongfully induced, the result of inadequate disclosure and representations by counsel (Feldman) to Suarez. The trial judge allowed the plea to be withdrawn.

The motion to withdraw the guilty plea alleged that Feldman had inadequately represented certain critical matters to Suarez which induced him to plead guilty. Inherent in a motion raising these grounds to withdraw the plea, is the necessity for a full inquiry into conversations between attorney and client. Everyone including the trial court, defense counsel, defendant and the government understood that Suarez had to allow Feldman to testify in order to prove the allegations raised.

There was no reason to even imagine that by allowing Feldman to testify for purposes of setting aside the guilty plea, Suarez would face a Hobson's choice of exercising his statutory right to withdraw

the plea in order to enjoy his sixth amendment right to a trial by jury, and thereby waive his attorney-client privilege for all future purposes, as well as his privilege not to take the stand to rebut inadmissible admitted evidence at trial.

Indeed, at the time of the evidentiary hearing on the motion to withdraw the guilty plea, the government gave no indication that once Richard Suarez waived his attorney-client privilege in that limited proceeding, it would introduce Feldman's testimony at the trial on the merits; and when Suarez agreed to waive the privilege for the limited purpose of that hearing, it was not forseeable that the government

would attempt to do so. Suarez did not intend to waive the attorney-client privilege for any purpose except the hearing on the motion to withdraw the plea.

When the government did call Feldman as a witness at trial on its case in chief, defense counsel objected on grounds that the waiver of the attorney-client privilege at the time of the proceedings to vacate the guilty plea was not a waiver for trial, but that it was made only for purposes of the pretrial evidentiary hearing.

The trial court, understanding that counsel was arguing limited waiver, overruled the objection and stated that the court of appeals would "set [the court] straight" if it had erred.

It is undisputed that counsel's objection, although very clear as to the grounds asserted, was made without specific citations to cases or rules. It also must be noted, however, that there had been no prior warning that Feldman was going to be called as a government witness when he was suddenly marched into the courtroom as the government's third witness.

The Eleventh Circuit recognized that Feldman's testimony was essential for purposes of the evidentiary hearing. The panel also recognized that counsel objected vigorously on grounds that this was a violation of the attorney-client privilege. The thrust of its affirmance, then, will have draconian consequences for the defen-

dant who later attempts to vacate an improperly induced guilty plea and finds himself convicted on the basis of testimony from his former attorney. According to this opinion, when a defendant has no choice but to call his former attorney to testify at a hearing on a motion to withdraw an improperly induced guilty plea in order to exercise his right to a jury trial, he has waived the attorney-client privilege for all future proceedings, and thereby waived his sixth amendment right to effective assistance of counsel.

We recognize that normally when the attorney-client privilege is waived, the waiver is for all purposes in the future.

The Eleventh Circuit cited a number of cases in support of this general proposition. But it is the position of Amicus that the cases cited in the opinion are not applicable because the application of that principle to these facts leads to an inherently unfair and unconscionable result.

Here, the waiver was made and intended by Suarez to be for the sole purpose of establishing his sixth amendment right to the jury trial which was denied him as the result of his erroneously induced guilty plea. Even the Eleventh Circuit recognized that the only way Suarez could have succeeded on his motion to vacate the guilty plea was to open the door to Feldman's testimony.

Thus, when Suarez raised the issue of the adequacy of the representations made by Feldman to him to induce him to plead guilty, he also unwittingly gave the government its best witness against him at trial, and surprisingly the Eleventh Circuit found nothing wrong with this procedure.

Kercheval is Applicable, but the Instant Case is far More Egregious

The instant case is similar to, but even more aggravated than the case of Kercheval v. United States, 274 U.S. 220 (1927), in which after the trial court granted defendant's motion to withdraw his guilty plea and allowed him to enter a plea of not guilty, it permitted the prosecution as a part of its case in chief to

admit as evidence a certified copy of the plea of guilty.

Kercheval holds that putting the guilty plea in evidence placed defendant in a dilemma which was totally inconsistent with the determination of the court vacating the guilty plea and awarding him a trial, and that the withdrawal of a guilty plea is meaningless, if notwithstanding the withdrawal, the plea of guilty could be used in evidence after defendant entered a plea of not guilty.

Here, by allowing Feldman to testify about what Suarez may have told him concerning his involvement in the charged offenses, the government has far surpassed the unreasonableness and the evils found by

by this Court in admitting a guilty plea into evidence at trial following the withdrawal of the plea.

In Kercheval, this Court held that it was totally improper to allow the jury to see the piece of paper signed by the defendant. Yet here, both the trial and appellate courts condoned the action of the government in calling a criminal defense attorney as a witness against his former client about their discussions which took place within the trust and confidentiality of the attorney-client relationship.

Although the government was precluded by Kercheval from showing the jury the piece of paper on which Suarez acknowledged his guilty plea, it was permitted to

present as its live, surprise witness, the defense attorney to whom Suarez, according to Feldman, made inculpatory statements in the course of their (supposedly confidential) relationship.

It is difficult to imagine a witness who would be more effective for the prosecution, more compelling for the jury and more prejudicial to the defense, than a criminal defense attorney testifying against a former client on the issue of guilt.

It is also difficult to imagine a more unfair tactic for the government to employ to convict an individual charged with criminal conduct, under these facts, where the former attorney was the only

witness who could substantiate the allegations in defendant's motion to vacate the guilty plea.

The unfortunate result of the opinion of the Eleventh Circuit is that by withdrawing his guilty plea, Suarez gave the government its best witness against him. In Kercheval, the government just showed the jury a piece of paper. But here, Suarez was forced to gift the government with a live witness. So while the principles of Kercheval are entirely applicable, the result in the instant case creates a far more unfair result. Could the jury possibly have had any reasonable doubt after defense counsel testified that Suarez admitted guilt?

II

IT IS BOTH UNREASONABLE AND UNNECESSARY TO REQUIRE COUNSEL IN THE HEAT OF A TRIAL, TO GIVE SPECIFIC RULE AND CASE CITATIONS IN ORDER TO PRESERVE OBJECTIONS FOR APPELLATE REVIEW.

The Eleventh Circuit Failed to Consider Simmons

In reaching the conclusion that a waiver of the attorney-client privilege existed at the time of the trial, the Eleventh Circuit simply failed and refused to consider this Court's decision in Simmons v. United States, 390 U.S. 377 (1968). Because trial counsel failed to specifically cite the Simmons decision when she objected on grounds of the attorney-client privilege, the panel decided that it need not deal with the Simmons argument and

that, therefore, it need not grant Suarez relief under the Simmons rationale.

We fervently disagree with both of these conclusions for the following reasons: First, it was not necessary for counsel to refer to specific case or rule citations when making objections in the heat of trial. See, for example, Blair v. United States, 401 F.2d 381, 391 (D.C. Cir. 1968), wherein the court held that even a brief objection presenting the essence of the contention will receive the considered attention of the trial judge without need for a detailed particularization and citations.

Second, Simmons is the controlling precedent on these facts, regardless of

whether it was cited or not, and it cannot be overlooked or disregarded. The Eleventh Circuit, in effect, looked at the issues in a vacuum by refusing to consider Simmons and this, we suggest, warrants the granting of the petition for writ of certiorari.

The attorney-client privilege had not been waived by Suarez for purposes of his trial because of the very reasoning in Simmons. This clearly was the basis of the fervent objections made by trial counsel, even though she did not give the court the case by name at the moment that she was stung by the government's announcement that it was calling Feldman as a surprise witness on its case in chief.

A waiver of the privilege should not have been inferred on the part of Suarez, either by omission or commission, for the very reasons explained in Simmons. Accordingly, there has been serious, fundamental error committed here by both the trial and appellate courts.

Rules of Evidence And Procedure are Self-Executing and Need not be Invoked by Counsel in Order to be Applied.

In light of the very existence of Rule 410 of the Federal Rules of Evidence and Rule 11 (e) (6) of the Federal Rules of Criminal Procedure (both of which deal with the inadmissibility of pleas, plea discussions and related statements) it is unreasonable and unnecessary for counsel to be

expected or required to cite them to a trial judge by number in order for them to be operational in any given case; and in order to be allowed to argue a violation of one or both on appeal.

Amicus finds strong policy reasons to allow trial counsel to rely on the Federal Rules of Evidence and of Criminal Procedure to govern the admissibility of testimony without being expected to cite them in order to activate them in any case. This would be a throwback to the ancient days of exceptions.

Lawyers who practice in the criminal courts, prosecutors and defense counsel alike, will be hard-pressed at times to try cases under these strict and unreasonable

constraints. Yet this is another unfortunate result of the opinion of the Eleventh Circuit in this case.

Rules 410 and 11 (e) (6), supra, clearly state that plea discussions are inadmissible in a subsequent trial. But the thrust of the opinion of the Eleventh Circuit holds that the trial bar cannot rely on that rule to be self-executing. Rather, counsel must specifically cite those rules in the trial court or be precluded from arguing rule violations as grounds for reversal on appeal.

The next extension of this reasoning will be that counsel will have to make a specific disclaimer when writing to a prosecutor about a plea, that he is

invoking Rules 410 and 11 (e) (6) and therefore, the letter will be inadmissible in any proceeding. This is just as absurd as expecting defense counsel to invoke those rules at the proceedings to withdraw the guilty plea. The rules are the rules. They obtain whether or not counsel notes for the record that they exist and apply to this situation and are not waived.

CONCLUSION

The Attorney-Client Privilege Must be Protected

Although the application of Simmons to this case was ignored by the Eleventh Circuit, it needs to be addressed in this forum because it is the very issue raised by Suarez at trial.

Had the Eleventh Circuit given due consideration to Simmons, it would have come to the ineluctable conclusion that the attorney-client privilege was violated when the trial judge permitted the government to call Feldman to the witness stand. Suarez did not know until that moment that he was going to be faced with the intolerable dilemma of giving up one constitutional right in order to exercise another.

In Simmons, defendant was forced to choose between his fourth and fifth amendment rights. The choice here was no less offensive. Suarez found that he had involuntarily waived his attorney-client privilege when he exercised his statutory right to withdraw his guilty plea.

As a result of the decision of the Eleventh Circuit, the attorney-client privilege, which has become ever more fragile with recent developments in the law, is now in more danger than before.

In order for an attorney to render effective assistance to a person accused of crime, there has to be a relationship based upon trust, respect and confidentiality. The client must feel that he can talk to his attorney freely without fear that what he reveals in confidence to his attorney will be used against him in a court of law.

With the effective assistance of counsel comes the concomitant attorney-client privilege. If a client knows that his attorney may be called to testify against

him at some time in the future to reveal the substance of their supposedly privileged communications, then there will be a chilling effect on the attorney-client relationship, and thus, upon the sixth amendment right to effective assistance of counsel.

In order for the right to counsel to be a meaningful right, the client must be assured that everything he tells his attorney is going to be held in confidence and will not be used against him. A client must be able to trust his lawyer and rely on the lawyer not to give damaging evidence against him on the issue of guilt. And a client must be able to speak candidly with his lawyers in order for the lawyer to provide effective representation.

The Florida Criminal Defense Attorneys Association believes that it is essential for this Court to accept this case and to resolve the important and serious issues which are presented by the Petitioner, Richard Suarez.

Respectfully submitted, November 23, 1987

SHERYL J. LOWENTHAL, Counsel of Record

and

ROBERT KALTER, Attorney at Law

for F.C.D.A.A. as Amicus Curiae